Supreme Court, U.S.
FILED
DEC 27 2000
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(2)

No. 00-850

IN THE

Supreme Court of the United States

JENNIFER NEAL, *et al.*,

Petitioners,

v.

ST. LOUIS COUNTY BOARD OF POLICE COMMISSIONERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Did the Eighth Circuit Court of Appeals properly apply this Court's decision in *Lewis v. County of Sacramento*, 523 U.S. 833 (1998) when it held that the actual time to deliberate necessary to make a substantive due process violation truly conscience shocking does not include the hours before an unintentional shooting of a police officer during a sudden shootout with a suspected drug dealer even if both the deceased officer and the shooting officer allegedly violated departmental regulations that may have averted the incident or lessened its severity?

PARTIES TO THE PROCEEDING

Petitioners

Jennifer Neal, personal representative of the estate of Willie Neal, Jr., and Jennifer Neal on her own behalf.

Respondents

St. Louis County Police Officer Carlerton Peterson; St. Louis County, Missouri; Ronald Battelle, Chief of Police; and Robert Flag, Chairman; Gene Warmann, Vice Chairman; Patrick Twardowski, Secretary; Sheila Hoffmeister, Member; and Leon Burke, member; who together comprise the St. Louis County Board of Police Commissioners.

The St. Louis County Police Department and the St. Louis County Board of Police Commissioners are not suable entities with an existence separate from St. Louis County, and therefore, neither was a party to the proceedings below.

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STATEMENT OF CASE

A. Overview of Case

St. Louis County Police Officer Carl Peterson attempted to rescue Officer Willie Neal, a fellow officer who had been taken hostage at gunpoint and forced to the ground. Officer Peterson's lawful command to the assailant to stop and put down his gun was met with a hail of gunfire. Officer Peterson returned fire with two shots in an attempt to protect Officer Neal and himself. Tragically, one of those shots went astray and unintentionally struck Officer Neal thereby killing him.

The fundamental question before this Court is whether the substantive due process claims of the deceased police officer and his family are governed by the "intent to cause harm standard" that applies to officers who must act in haste, under extreme pressure and without the luxury of a second chance, or the "deliberate indifference standard" that applies where police officers actually have the opportunity to deliberate before pursuing a course of action. *Lewis v. County of Sacramento*, 523 U.S. 833 (1998). The answer to this first question in turn depends on whether the shooting officer's opportunity to deliberate is framed by the time when he recognized a need to use lethal force and actually made the decision to shoot, or by the hours before the shooting when the officers' alleged violations of departmental rules may have contributed to the tragedy.

The Circuit Court of Appeals for the Eighth Circuit has correctly identified the controlling legal precedents in *Lewis* and correctly applied *Lewis* to the facts of this case in finding that it is inappropriate to look outside the time period immediately preceding the shooting officer's decision to

return fire in order to determine whether his conduct was truly conscience shocking. Accordingly, this Court should not issue its writ of certiorari.

B. Nature of Case and Course of Proceedings

Petitioners filed a First Amended Complaint ("Complaint") alleging eleven counts.[1] App., p. 13.[2] Counts I and II attempt to assert claims under 42 U.S.C. § 1983. In each of those counts Jennifer Neal, in her capacity as the personal representative of the estate of Officer Neal, alleges that Officer Peterson (Count I) and the other Respondents (Count II) deprived Officer Neal of the rights, privileges, and immunities secured to him by the Fourth and Fourteenth Amendments to the Untied States Constitution. The District Court entered summary judgment on Counts I and II in favor of Officer Peterson and the other Respondents in its Memorandum and Order dated June 9, 1999. App., p. 191. Petitioners now concede that their Fourth Amendment rights were not violated as alleged in Counts I and II. Petition for Writ of Cert. p. 15-16.

Counts III through X of the Complaint also attempt to plead causes of action under 42 U.S.C. § 1983. In Counts III through VI, Petitioners allege that Officer Peterson deprived Petitioners of a familial relationship with Officer Neal in violation of rights secured by the Fourteenth Amendment

1. The plaintiffs in the district court included Petitioners and Jamelah Neal, Whitney Neal and Willie Neal, Sr., who are respectively the wife, son, daughter and father of the late Officer Willie Neal.

2. References to "App. p. __." refer to pages of Appellants' Appendix Filed in the Eighth Circuit Court of Appeals.

when Officer Peterson shot Officer Neal. In Counts VII through X, Petitioners claim that the County, Chief Battelle, and the Members of Board of Police Commissioners failed to train, supervise or control Officer Peterson in violation of the Petitioners' due process rights, thereby leading to the death of Officer Neal. In Count XI, Jennifer Neal attempted to invoke the pendent jurisdiction of the District Court to assert a Missouri wrongful death claim. The District Court dismissed Counts III through XI of the Complaint in its Order and Memorandum dated March 26, 1999. App., p. 138.

Petitioners filed a notice of appeal to the United States Circuit Court of Appeals for the Eighth Circuit by and through Jennifer Neal, *pro se*, in which they provided notice of their intent to appeal the decision of the District Court to grant summary judgement to defendants. App., p. 203. Petitioners did not appeal the dismissal of Counts III through XI that were dismissed by the District Court. App., p. 203. The Eighth Circuit, however, allowed the Petitioners to brief allegations of error by the District Court in the dismissal of Counts III through X, and the Eighth Circuit then upheld the District Court's Dismissal of those Counts. Petition for writ of Certiorari, Appendix A. Petitioners did not appeal or brief the dismissal of their wrongful death claim contained in Count XI. Count XI was therefore abandoned on appeal to the Eighth Circuit.

C. Factual Background

On January 29, 1997, the late Officer Willie Neal was tragically and unintentionally shot by a fellow police officer, Officer Carl Peterson, during a shootout with a suspected drug dealer. At that time, Officer Neal was a commissioned officer serving in the St. Louis County Police Department

Bureau of Drug Enforcement, Multi-Jurisdictional Task Force (Task Force), and Officer Peterson was a commissioned officer serving in the St. Louis County Police Department's Bureau of Drug Enforcement, Bureau of Special Operations. App., p. 153, ¶¶1 & 4. The Task Force focused its efforts on enforcing state laws against the sale and possession of illegal narcotics within St. Louis County. App., p. 153, ¶2. The Bureau of Special Operations focused its efforts on enforcing state vice laws, but Officer Peterson also assisted Task Force members on drug buys when Task Force members needed additional assistance. App., p. 154, ¶¶4 & 5.

On the afternoon of January 29, 1997, Officer Neal asked Officer Peterson to accompany him on an undercover deal Officer Neal had arranged for that afternoon on Natural Bridge Road in St. Louis County. App., p. 154, ¶6. Officer Peterson told Officer Neal that he would need to get the approval of his supervisor. App., p. 157, ¶3 Officer Neal and Officer Peterson went to Officer Peterson's acting supervisor, Sergeant Bill Hines. App., p. 157, ¶3. Officer Neal spoke with Sgt. Hines, "explaining that he had set up an undercover purchase of marijuana on Natural Bridge in St. Louis County and needed assistance in carrying out the deal." Petition for Writ, p. 6. While Officer Neal and Sgt. Hines talked, Sgt. Hines offered to provide additional backup officers; but Officer Neal, who was the senior officer, refused that offer. App., p. 157, ¶3 & p. 158, ¶ 7. Officer Peterson then obtained the approval of Sgt. Hines and agreed to assist. App., p. 154, ¶7 & p. 157, ¶3. There is no evidence in the record to show that Officer Neal ever sought or obtained the approval of his supervisor.

Late on the afternoon of January 29, 1997, Officer Neal and Officer Peterson drove to a Popeye's Restaurant on

Natural Bridge Road in St. Louis County in Officer Neal's undercover car. App., p. 154, ¶8. Officer Neal drove onto the Popeye's lot, but he did not contact anyone.[3] App., p. 154, ¶9. Officer Neal then left Popeye's and drove east on Natural Bridge to the Mac's Package Liquor Store (Mac's) located at 5956 Natural Bridge Road in the adjacent City of St. Louis. App., p. 154, ¶10.

Officer Neal drove onto Mac's parking lot and parked his car perpendicular to and facing the west wall of the building near to its back (south) wall. App. at 154, ¶¶10-11. Both Officer Neal and Officer Peterson remained in the car. App., p. 154, ¶11. Within minutes after arriving at Mac's, a person later identified as Jerome Baker ("Baker"), approached the car from the passenger side and looked in the passenger window at Officer Peterson.[4] App., p. 154, ¶12. Baker then walked around the rear of the car and headed toward the driver's door. App., p. 154, ¶13. Officer Neal got out of his car and walked toward Baker. App., p. 154, ¶14.

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3. Petitioners posit that Officer Neal was attempting to set up a drug purchase from a suspect named Collis Lee at 2:00 p.m. on the day of shooting. Petition For Writ, p. 5.

4. Petitioners are absolutely wrong when they assert at page 28 of their brief that "Neal and Peterson sat in their car in the liquor store parking lot for approximately 45 minutes before being approached by Baker." Petitioners also posit that Baker approached Officer Neal's car 30 minutes after they drove to Mac's Package Liquor. Petition For Writ, p. 6. Neither time line is supported by competent evidence in the record. The 45 minute time line is apparently premised upon the hearsay conclusions contained in the report of a critical review panel. That report was properly objected to when it was proffered in opposition to Defendants/Respondents' Motion For Summary Judgment. App., p. 184, p. 13, Exhibit C.

When Officer Neal and Baker met, they shook hands and started talking. App., p. 154, ¶15. As Officer Neal and Baker talked, they walked towards the southwest corner of Mac's building where they stopped and continued to talk. App., p. 155, ¶16. After a brief conversation, Officer Neal and Baker walked around the rear corner of the building. App., p. 155, ¶17. After a few moments, Officer Peterson saw Officer Neal slowly raise his left hand in what he recognized as a sign of trouble. App., p. 155, ¶19. Officer Peterson also realized he could no longer see Baker although Officer Neal had never left his sight. App., p. 155, ¶19 & p. 158, ¶9. At that point, Officer Peterson got out of the undercover car and slowly moved so that he could see around the southwest corner of the building. App., p. 155, ¶18. Officer Peterson moved as quietly as he could so that he would not alert Baker to his actions. App., p. 155, ¶18.

When Officer Peterson looked around the corner of the building, he was twenty to thirty feet from Baker. App., p. 155, ¶19. Baker was pointing his gun at Officer Neal's head, and Officer Neal was starting to lie down on the ground. App., p. 155, ¶20. Officer Peterson waited for Officer Neal to get completely on the ground. App., p. 155, ¶21. At that time, Baker was bending over Officer Neal pointing his pistol directly at Officer Neal's head, and jabbing his pistol toward Officer Neal's head in a hostile and threatening manner. App., p. 155, ¶21.

After Officer Neal got down to the ground, Officer Peterson announced that he was a police officer and ordered Baker to stop and put his gun down. App., p. 155, ¶22. At that point, Officer Peterson already had his pistol out and in the ready position. App., p. 155, ¶22. Upon hearing Officer Peterson, Baker instantly whirled and started firing at Officer

Peterson. App., p. 155, ¶23. When Baker started shooting at Officer Peterson, Officer Peterson fired two shots at Baker in order to defend himself and Officer Neal. App., pp. 155 & 158, ¶24 & 16. By the time Officer Peterson fired his first shot, Baker was standing erect. App., p. 158, ¶11. Officer Peterson made the decision to shoot at Baker the instant before he actually shot at Baker. App., p. 158, ¶5. All the ammunition in Officer Peterson's service pistol on January 29, 1997, was ammunition that had been issued to him by the St. Louis County Police Department. App., p. 157, ¶¶1 & 2.

When Officer Peterson realized that Baker was continuing to shoot at him even after he had fired two shots, Officer Peterson moved to his left. App., p. 156, ¶24. After Officer Peterson started to move, he did not fire any additional shots. App., p. 156, ¶25. In all, Baker fired four or more shots at Officer Peterson. App., p. 156, ¶26.

At the scene of the shooting, Officer Peterson did not know that he fired a shot that struck Officer Neal. App., p. 156, ¶27. Officer Peterson did not shoot at Officer Neal, and he did not believe that Officer Neal would be endangered by the shots he fired at Baker. App., p. 156, ¶28. Officer Peterson did not intend to shoot Officer Neal or to harm Officer Neal in any way. App., p. 156, ¶¶28, 30, & 31. Officer Peterson also never intended to worsen Officer Neal's legal plight. App., p. 156, ¶32.

Officer Neal was the senior officer on January 29, 1997. App., p. 158, ¶7. It was Officer Neal's buy. App., p. 158, ¶7. Officer Neal had the discretion to terminate the buy at any time. App., p. 158, ¶7. Officer Neal also had the discretion to use a "wire" or a bullet proof vest. App., p. 158, ¶7. Officer

Peterson was not Officer Neal's supervisor. App., p. 158, ¶7. Officer Peterson did not have the authority to order Officer Neal to wear a "wire" or to wear a bullet proof vest. App., p. 158, ¶7.

REASONS FOR DENYING THE WRIT

Petitioners seek a writ of certiorari to review the decision of the Eighth Circuit Court of Appeals in *Neal v. St. Louis County Bd. Of Police Commissioners*, 217 F.3d 955 (8th Cir. 2000). In that decision, the Eighth Circuit held that Officer Carl Peterson did not violate Petitioner's substantive due process rights when Officer Peterson unintentionally shot Officer Neal during a shootout with an assailant who was threatening Officer Neal with a gun. The petition for writ of certiorari should be denied because the Eighth Circuit correctly identified and applied in this case the controlling legal precedents set out in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

The Neals brought this action under 42 U.S.C. § 1983. The essential elements of an action brought under § 1983 are:

> (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the constitution or laws of the United States.

Parrat v. Taylor, 451 U.S. 526, 535 (1981). Officer Peterson did not violate Petitioners' federally protected rights, and therefore, Petitioners' § 1983 claims against Respondents must fail. *Id.*

Substantive due process is the only issue Petitioners have briefed in their Petition for a Writ of Certiorari. The question before this Court is whether Petitioners' substantive due process claims are controlled by the "intent to cause harm" standard or the lesser "deliberate indifference" standard both discussed at length in *Lewis*. The answer to that question depends upon the facts of the case and whether, under those facts, Officer Peterson actually had time to deliberate prior to acting. Where there is no time for actual deliberation, the "intent to harm" standard is applicable. *Lewis*, *supra* at 523 U.S. 836 & 853-854.

The Eighth Circuit held that based on the facts of this case, "it is inappropriate to look outside the time period immediately preceding [Officer] Peterson's decision to fire his gun to determine whether Peterson's conduct was truly conscience shocking." Petition for Writ, Appendix A, p. 8a. Petitioners assert that the Eighth Circuit erred, and instead, encourage this Court to look to the hours preceding the shooting and various alleged violations of departmental regulations that Petitioners contend caused the tragic shooting of Officer Neal in order to find that Officer Peterson actually had time to deliberate about his actions. Petitioners argue that such time for actual deliberation made Officer Peterson's actions truly shocking to the conscience and therefore a violation of Petitioners' substantive due process rights.

The substantive due process component of the Fourteenth Amendment that Petitioners rely upon bars " 'certain government actions, regardless of the fairness of the procedures used to implement them.' " *Lewis*, *supra* at 523 U.S. 840. Only the most egregious official conduct violates the substantive component of the Due Process

Clause. *Id.* at 523 U.S. 846. Executive action violates substantive due process only where it shocks the conscience. *Id.* at 523 U.S. 846. This comports with the general intent of the Due Process Clause which is to prevent government officials from abusing their power or employing it as an instrument of oppression. *Id.* at 523 U.S. 846. Clearly, due process does not impose liability whenever someone cloaked with state authority causes harm. *Id.* at 523 U.S. 848. Further, liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. *Id.* at 523 U.S. 849.

Under the terrifying circumstances facing Officer Peterson in this case, an errant shot would not even give rise to negligence; and negligence itself is categorically below the threshold of liability for due process violations. *Lewis*, *supra* at 523 U.S. 849; and *Daniels v. Williams*, 474 U.S. 327, 328 (1986). This Court should therefore reject Petitioners' substantive due process claims.

The burden to prevail on a substantive due process theory is significantly higher than mere negligence. *Lewis*, *supra* at 523 U.S. 836 & 854. In *Lewis*, this Court analyzed substantive due process liability in the context of police actions made in haste, under pressure, and without the luxury of a second chance. In that case, a police officer observed a motorcycle carrying a driver and passenger approach at high speed while the officer was investigating another matter. The officer turned on his flashing lights, ordered the driver to stop, and attempted to block the path of the motorcycle. The driver of the motorcycle, however, evaded the attempt to block his escape and raced away from the scene at high speed. The police officer jumped into his patrol car and immediately chased the motorcycle for about 75 seconds at

speeds up to 100 mile per hour. This chase probably violated several police department general orders. *Id.* at 523 U.S. 838-839. After a short chase, the motorcycle fell on its side. The pursuing officer was unable to stop his car before hitting and killing the passenger. The parents of the passenger sued under 42. U.S.C. § 1983 alleging a violation of the decedent's substantive due process right to life.

In analyzing the parents' substantive due process claims, this Court observed that what shocks the conscience in one situation may not be so shocking in another situation. *Id.* at 523 U.S. 850. Therefore, in order to preserve the constitutional proportions of substantive due process, an exact analysis of the circumstances is required before any abuse of power is condemned as shocking to the conscience. *Id.* at 523 U.S. 850-851. To further clarify the constitutional proportions of substantive due process, this Court emphasized "that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *Id.* at 523 U.S. 848.

This Court then reviewed its substantive due process holdings as they applied in prison environments to inmates' need for food, clothing, shelter, medical care, and reasonable safety. In those contexts, prison officials are held to a deliberate indifference standard because they have the luxury of time to make unhurried judgements often with time for repeated reflection. *Id.* at 523 U.S. 853. That is because the deliberate indifference standard only makes sense where there is actually time to deliberate. *Id.* at 523 U.S. 851.[5]

5. "Actual deliberation" is not deliberation for only a moment or instant of time as would be sufficient in a state criminal proceeding. *Lewis*, *supra* at 523 U.S. 851 n.11.

This Court then contrasted normal prison conditions with prison riot conditions where time to deliberate is absent. *Id.* at 523 U.S. 852. During prison riot situations, this Court has required a much higher level of fault than deliberate indifference. *Id.* at 523 U.S. 852-853. In such situations, prison officials violate prisoners' Eighth Amendment rights only where the officials act "maliciously and sadistically for the very purpose of causing harm." *Id.* at 523 U.S. at 853.

With that background, this Court compared the position of police officers who must act in haste, under pressure, and without the luxury of a second chance to that of prison officials facing a riot. *Id.* at 523 U.S. 853.

> Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made in "haste, under pressure, and frequently without the luxury of a second chance."

Lewis, *supra* at 523 U.S. 853. This Court then held that just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, intent to cause harm unrelated to the legitimate object of arrest is needed to establish liability for violations of substantive due process in police pursuit cases. *Id.* at 523 U.S. 836 & 854. Accordingly, "high speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under §1983." *Id.* at 523 U.S. 854.

The holding in *Lewis*, applies with equal force to substantive due process claims brought against police officers who are forced to make life and death decisions in haste, under pressure, and without the luxury of a second chance. Since *Lewis* was decided, the Second, Sixth, Seventh, Eighth, Ninth, and Tenth Circuit Courts of Appeals have applied the holding in *Lewis* to shooting cases involving law enforcement officers. *Medeiros v. O'Connell*, 150 Fd 164 (2d Cir. 1998) (shot fired by trooper trying to end a school bus hijacking unintentionally struck and killed a hostage); *Claybrook v. Birchwell*; 199 F.3d 350 (6th Cir. 2000) (Police Officers returning fire after being fired upon by an assailant unintentionally shot a passenger in the car the assailant used for cover); *Schaefer v. Goch*, 153 F.3d 793 (7th Cir. 1998) (police officer fired a burst of submachine gun fire at an armed man killing the man and unintentionally killing a hostage held only inches from the armed man); *Neal v. St. Louis County Bd. Of Police Commissioners*, 217 F.3d 955 (8th Cir. 2000) (see Factual Background set forth above); *Moreland v. Las Vegas Metropolitan Police Department*, 159 F.3d 365 (9th Cir. 1998) (police shot and killed a bystander when they tried to shoot another man who was shooting at other civilians.); and *Radecki v. Barela*, 146 F.3d 1227 (10th Cir. 1998) (deputy ordered civilian to intercede in fight with assailant for control of deputy's pistol, and civilian was shot after assailant gained control of pistol and deputy fled).

In each of these cases, the circuit courts applying the holding in *Lewis* "recognized that the critical question in determining the appropriate standard of culpability is whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct." *Moreland, supra* at 159 F.3d 373. And in each of these cases,

the court found that the police officer was caught up in a rapidly evolving situation that did not allow the officer the luxury of actual deliberation; and therefore, because the officer did not intend to harm the person who was shot and did not intend to worsen that person's legal plight, the police officers did not violate the injured person's substantive due process right to life. The Eighth Circuit correctly found that the same legal reasoning and "intent to cause harm" standard are applicable to Officer Peterson actions in this case.

Petitioners argue that the *Lewis* "intent to cause harm" standard should not apply to Officer Peterson's actions because breaches of departmental rules and regulations and various unsound police practices during the hour or so before the shooting caused the death of Officer Neal; and Officer Peterson had the time to actually deliberate during that period.[6] Petitioners then argue that since Peterson had over one hour to actually deliberate on the effect of these violations of departmental regulations, the lesser "deliberate indifference" standard should apply rather than the more stringent "intent to cause harm" standard enunciated in *Lewis*.

In considering this central thesis of Petitioners' brief, this Court should note that Petitioners themselves attribute the violations of departmental standards and policies to "blatant ignorance." Petition for Writ, p. 1. There is nothing in the record to demonstrate or even suggest that either officer ever actually recalled much less considered any of the policies that are alleged to have been violated.

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6. It should be noted that Officer Neal, as the senior officer who planned the buy, had an equal opportunity and a superior obligation to ensure that all departmental regulations were observed.

In the past, when this Court found that police conduct in the middle range between negligence and intentional conduct was sufficient to shock the conscience, the police officers "apparently acted with full appreciation of what the court described as the brutality of their acts." *Lewis, Id.* at 523 U.S. 850 n.9 citing *Rochin v. California*, 342 U.S. 165 (1952). In other words, the officers in *Rochin* acted with full knowledge of the wrongfulness of their acts. There is no evidence in the record to establish that Officer Peterson acted with knowledge that either he or Officer Neal had violated departmental regulations; and therefore the lesser standards of recklessness, deliberate indifference or conscious disregard are inapplicable to this case.

More importantly, even if departmental regulations were breached and even if these breaches "offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, [they do] not shock the conscience, and [the officers] are not called upon to answer for [them] under §1983." *Lewis, supra*, at 523 U.S. 855. Petitioners have cited no case law supporting their theory that these alleged breaches of policy or sound police practice themselves violate the constitution. That is because violations of police department policies or regulations do not themselves constitute a violation of constitutional rights.[7] *Cole, supra* at 993 F.2d 1334 and *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992).

The real issue in this case is whether Officer Peterson's use of force violated the constitution, not whether Officer

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7. Police departments are always free to establish more stringent rules for their officers than the constitution requires. *Cole, supra* at 993 F.2d 1334 and *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992).

Peterson should be disciplined for violating departmental policy.[8] *Cole*, *supra* at 993 F.2d 1334. To answer that question, this Court should focus on whether Officer Peterson's decision to use lethal force and the execution of that decision were made at a time when deliberation was practical or whether the decision to shoot at Jerome Baker and the execution of those shots were made in haste, under pressure and without a second chance. *Lewis*, *supra* at 523 U.S. 851-854 and *Moreland*, *supra* at 159 F.3d 373.

In this case, Officer Neal unexpectedly moved to a second location in a neighboring jurisdiction to find a suspect, thereby removing any advantage of pre-planning the operation. App., p. 154-5, ¶¶8-12. Officer Neal then unexpectedly deviated from what Petitioners say is established police practice by walking out of the full sight of his backup officer. App., p. 154-5, ¶¶14-19. In the process, he led Baker out of the sight of Officer Peterson. App., p. 154-5, ¶¶14-19. This forced Officer Peterson to move quickly to re-establish visual contact with Baker. App., p. 155, ¶¶18-19. Once Officer Peterson re-established visual contact with Baker, he saw Baker pointing a pistol at Officer Neal's head. App., p. 155, ¶20. At any moment, Baker could have fired his gun killing Officer Neal.

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8. Officer Peterson made a constitutionally correct decision that he was privileged to use lethal force to defend himself and Officer Neal. *See Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 1701, 85 L. Ed. 2d 1 (1985). ("Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Garner*, *supra* at 105 S. Ct. 1701.)

Clearly, Officer Peterson was forced to decide upon a response and then act in haste, while under excruciating pressure and with no opportunity for a second chance. Actual deliberation about various alternatives was not practical. Therefore, the application of the "intent to cause harm" standard is correct. *Lewis*, *supra* at 523 U.S. 836 & 854. Under these facts, Officer Peterson's actions certainly do not shock the conscience in a constitutional sense.

As an additional practical consideration, the constitutionality of the decision to use lethal force is so fact-driven that no officer can decide in advance the precise circumstances under which he will shoot or not shoot. The officer must first see the events as they unfold and then use his best judgment in light of what he knows about the situation at that time.[9] The decision to shoot back in a gun battle and the execution of that decision are made in terrifying and uncertain conditions. Often, as in this case, the situation will explode upon the officer. Further, every fraction of a second may mean the difference between life and death. Each of these factors is further compounded by the grave legal and moral consequences that surround the decision whether to use lethal force. The pressure is surely excruciating. This Court has recognized the extremely difficult task facing police officers under such circumstances by holding that only an intent to cause harm unrelated to a legitimate law enforcement objective will shock the conscience. *Lewis*, *supra* at 523 U.S. 836 & 854.

This case is further differentiated from those in which the lesser deliberate indifference standard is appropriate by

9. There is no constitutional requirement that an officer shoot an aggressor in certain situations. Therefore, the officer always has the constitutionally permissible option not to use lethal force.

the essential governmental interest in protecting innocent life. In *Lewis*, this Court observed that a deliberate indifference standard is appropriate in cases alleging a failure to provide decent care and protection to those it locks up because there are no strong countervailing interests that excuse such failures. *Lewis*, *id.* at 523 U.S. 851. In other words, typically, there is not a clash between providing care or protection to inmates and other governmental responsibilities. *Lewis*, *id.* at 523 U.S. 852. However, in this case, Respondents had the strongest possible countervailing interest, the preservation of innocent life. Officer Peterson acted to preserve his own life and that of Officer Neal. Aff., p. 155, ¶24. He did not intend to harm Officer Neal. App., p. 156, ¶¶27-32. The existence of such strong countervailing governmental interests further support the application of the "intent to cause harm" standard to Petitioners' substantive due process claims.

Existing law and sound public policy also support the Eighth Circuit's decision. In this case, it is important to remember that Officer Peterson was attempting to seize an assailant by firing two shots at an assailant who was then and there shooting at Officer Peterson. If Officer Peterson's shots had hit their intended target, he would have effected a Fourth Amendment seizure. *Brower v. County of Inyo*, 489 U.S. 593, 596-597 (1989). In a Fourth Amendment case, the court would only scrutinize the seizure, and not the events leading up to the seizure. *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) and *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992). That is because the Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general. *Cole*, *supra* at 993 F.2d 1333. Accordingly, if Officer Peterson had hit Baker, his intended target, the Court would not scrutinize pre-seizure conduct

such as alleged violations of department rules and regulations or sound police practice occurring before the moment of the shooting.

Likewise, this Court should not scrutinize Officer Peterson's pre-shooting conduct in this case because the Due Process Clause of the Fourteenth Amendment, like the Fourth Amendment, does not prohibit incorrect or ill-advised conduct in general. *Collins v. City of Harker Heights, Texas*, 503 U.S. 127, 129 (1992). Instead, the Due Process Clause prohibits arbitrary action of government officials that shocks the conscience. *Lewis*, *supra* at 523 U.S. 846. This Court has repeatedly emphasized that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.' " *Lewis, supra* at 523 U.S. 846. Officer Peterson's response to the hail of gunfire engulfing him was both reasonable and courageous. It certainly was not egregious official conduct. Any other holding will counsel police officers to shrink from the danger of armed confrontation in the pursuit of noble purposes and surely undermine police morale. Accordingly, this Court should not consider ill-advised conduct or a failure to follow department regulations or sound police practices occurring before Officer Peterson fired his two shots even if such failure created the situation in which the officer was fired upon.

Additionally, it would be fundamentally unfair to tell a police officer that his pre-shooting conduct will not be scrutinized if he is able to hit his intended target during a shootout. But if the pressure, the need for haste, the lack of a second chance, or just plain misfortune cause the officer to hit an unintended target during a shootout, the Court will scrutinize everything leading up to the shooting. Such expansive scrutiny will force every police officer to

not only consider the immediate threat to his life but also all the events leading up to the shooting before he knows whether he can constitutionally return fire. That is an impossible task in the fury of a gun battle, and the constitution should not be interpreted to demand the impossible from a police officer.

Finally, this Court should consider the disastrous impact that Petitioners' proposed extension of the law could have in the future. For instance, a police officer seeing that another officer was taken hostage by an armed assailant and realizing that he or the other officer had violated a departmental rule that caused the incident would then be forced to conclude that he could not constitutionally intervene lest he unintentionally injure his fellow officer. Or worse yet, the officer taken hostage could be executed while his would-be rescuer sorted out the events leading up to the shooting and then applied departmental regulations to those events. Clearly, it would be better to allow the police officer in such a case to use his best judgment to resolve the crisis at hand, and then allow departmental discipline to remedy violations of policy or practice that caused or aggravated the situation.

Accordingly, this Court should reject Petitioners' contention that Officer Peterson violated their rights to substantive due process of law by refusing to grant its Writ of Certiorari in this case.

CONCLUSION

For the foregoing reasons, this Court should deny the Neals' Petition for a Writ of Certiorari.

Respectfully submitted,

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